

**STATE OF RHODE ISLAND
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND**

**In the Matter of the Petition of
City of Providence Board of Licenses**

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DBR No.: 20PDR001

DECISION

Introduction

On February 19, 2020, the Department received a Petition for Declaratory Order (“Petition”) from the City of Providence and its Board of Licenses. The Petition requests that the Department issue a declaratory order regarding the kitchen and food requirements for Class B liquor retailers (restaurants/bars). The Petition identifies the relevant existing Liquor Regulations as Rule 1.4.5 and Rule 1.4.21.¹ It concludes by asking the Department to: (1) “Determine the specific requirements for a kitchen in a Class B establishment;” (2) “Determine the nature and type of equipment contained to establish a kitchen or food preparation facility on a licensed premise;” and (3) “Provide any further guidance, opinion or clarification as to the ‘kitchen’ and accompanying food requirements for a Class B license holder.”

Issue

Whether the Department shall issue a declaratory order, decline to issue an order, or schedule the matter for further consideration.

Discussion

¹ The Department notes that these cited rules were promulgated consistent with the relevant statutes, R.I. Gen. Laws § 3-7-7 and § 3-1-1.

The applicable law regarding petitions for declaratory orders in the administrative law context begins with R.I. Gen. Laws § 42-35-8(a), which states: “A person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency applies to the petitioner.” Additionally, R.I. Gen. Laws § 42-35-8(c) provides: “Not later than sixty (60) days after receipt of a petition under subsection (a), an agency shall issue a declaratory order in response to the petition, decline to issue the order, or schedule the matter for further consideration.” And, R.I. Gen. Laws § 42-35-8(d) also states: “If an agency declines to issue a declaratory order requested under (a), it shall notify, promptly, the petitioner of its decision. The decision must be in a record and must include a brief statement of the reasons for declining. An agency decision to decline to issue a declaratory order is subject to judicial review for abuse of discretion...”

The Department’s regulations on Declaratory Rulings and Petitions, 230-RICR-10-00-3, Section 3.3(B) requires that the Petition “set out the state of facts relied upon in form similar to complaints in civil actions before the superior courts of this state.” The Petition does not offer a particular fact pattern. Rather, the issues raised are quite broad.

The issues raised in the Petition are not isolated in effect to the City of Providence. Different municipalities may have different views of the kitchen and food requirements for the restaurants and bars in their varying jurisdictions. The parties that would be bound by changes to the kitchen and food requirements include vastly different business models spread throughout the state. Further, state and local health authorities may have valuable insight to contribute to the stated issues. The fact that there is legislative interest in the topic of food

service at Class B retailers further demonstrates the broad interest in this issue.² Accordingly, these issues would be more effectively addressed through the rulemaking process. As such, the Department is considering issuing an Advanced Notice of Public Rulemaking pursuant to R.I. Gen. Laws § 42-35-2.5(a), providing a better alternative mechanism to address the issues at hand.³

For the reasons described above, the Department's exercise of discretion to deny the Petition is reasonable and prudent. "Section 42-35-8 is an administrative counterpart of the Declaratory Judgments Act;" and as such, the UDJA case law applies to agency declaratory ruling petitions as well. *Liguori v. Aetna Cas. & Sur. Co.*, 119 R.I. 875, 882–83, 384 A.2d 308, 312 (1978). "A trial justice is not mandated to entertain a request for declaratory relief; it is rather, purely discretionary." *Sauro v. Lombardi*, 178 A.3d 297, 304 (R.I. 2018)(noting that "it may have been prudent for the trial justice to decline to grant declaratory and injunctive relief rather than struggle with such a narrow path" on "jurisdictional tension."). Further, judges have declined to issue declaratory relief where an alternative procedure would address the issue. *See, e.g., Joslin v. Joslin*, No. 84-3439, 1985 WL 663563, at *2 (R.I. Super. Dec. 18, 1985)("it would not be an abuse of discretion for the court to deny declaratory relief as another remedy exists.")⁴

² See 2020 R.I. House Bill #7600 (held in Committee, proposing to codify the kitchen/food requirement regulations into statute and additionally and beyond the scope of the regulations, giving the local licensing boards the ability to grant permission to a licensee to stop food sale at 10 p.m.)

³ R.I. Gen. Laws § 42-35-2.5(a) provides: "An agency may gather information relevant to the subject matter of a potential rulemaking proceeding and may solicit comments and recommendations from the public by publishing an advance notice of proposed rulemaking in the state register and on its agency website, and indicating where, when, and how persons may comment before the rulemaking process begins."

⁴ Persuasive authority in other states provides an example of the soundness of choosing rulemaking over declaratory petitions in certain circumstances. *Fla. Optometric Ass'n v. Dep't of Prof'l Regulation, Bd. of Opticianry*, 567 So. 2d 928, 937 (Fla. Dist. Ct. App. 1990)("When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require a response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement *or* comply with the provisions of [Florida law] Section 120.54 governing rulemaking.")

Based on the foregoing, the Department hereby declines to issue a declaratory order in response to the Petition in conformity with R.I. Gen. Laws § 42-35-8.



Elizabeth M. Tanner, Esq.
Director
Department of Business Regulation
Dated: April 7, 2020

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A DENIAL TO ISSUE A DECLARATORY ORDER REQUESTED UNDER R.I. GEN. LAWS § 42-35-8(a). PURSUANT TO R.I. GEN. LAWS § 42-35-8(d), THIS ORDER MAY BE SUBJECT TO JUDICIAL REVIEW.

SERVICE CERTIFICATION

I hereby certify on this date of April 7, 2020, that a copy of the within Decision was sent by e-mail to: Louis A. DeSimone (ldatty@gmail.com) and Mario Martone (mmartone@providenceri.gov)

/s/ Jenna Giguere